80-614

Supreme Court, U. S.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN W. MARTIN *et al.*,
Petitioners,
v.
THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI OF JOHN W. MARTIN *ET AL.*

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QUESTION PRESENTED

Whether the court of appeals erred in holding that so long as the Personnel Board of Jefferson County was attempting to validate its employment tests for police officers and firefighters, the Board's "provisional use" of those tests was protected against liability under Section 713(b) of Title VII of the Civil Rights Act of 1964, even though the tests were not ultimately validated by the Board.

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CROSS-PETITION FOR WRIT OF CERTIORARI OF JOHN W. MARTIN *ET AL.*

Cross-petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 8, 1980.[1]

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[1] The parties to the proceeding in the court of appeals were The Personnel Board of Jefferson County, Alabama, the United States of America, and John W. Martin, Major Florence, Ida McGruder, Wanda Thomas, Eugene Thomas, and Charles Howard.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 616 F.2d 812. The opinion of the United States District Court for the Northern District of Alabama is unofficially reported at 14 FEP Cases 670. The opinions and orders of these courts are also reproduced in Appendices A through D of the Appendix to the Petition for Writ of Certiorari of the Personnel Board of Jefferson County, Alabama (No. 80-406, docketed September 13, 1980), which is incorporated here by reference.

JURISDICTION

This conditional cross-petition is filed pursuant to Supreme Court Rule 19.5. Cross-petitioners received the Petition for Writ of Certiorari of the Personnel Board of Jefferson County, Alabama on September 15, 1980.

This cross-petition seeks review of the judgment of the court of appeals entered on May 8, 1980. The timely petition for rehearing of John W. Martin *et al.* was denied by the court of appeals on June 16, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

This petition involves the construction of the following statutory provision and regulations:

Section 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12 (1976):

> "In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an

unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter."

Section 1601.33 of the EEOC Procedural Regulations, 29 C.F.R. § 1601.33 (1979):

"Only the following may be relied upon as a 'written interpretation or opinion of the Commission' within the meaning of Section 713 of Title VII:

(a) A letter entitled 'opinion letter' and signed by the General Counsel on behalf of the Commission, or

(b) Matter published and specifically designated as such in the FEDERAL REGISTER, including the Commission's Guidelines on Affirmative Action, or

(c) A Commission determination of no reasonable cause, issued under the circumstances described in § 1608.10 (a) or (b) of the Commission's Guidelines on Affirmative Action 29 CFR Part 1608, when such determination contains a statement that it is a 'written interpretation or opinion of the Commission.'"

Section 1607.9 of EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.9 (1977):

> "Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided*: (a) The person can cite substantial evidence of validity as described in § 1607.7(a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained."

STATEMENT OF THE CASE

The issue presented in this cross-petition involves the scope of injunctive relief granted below to cross-petitioners, who are plaintiffs in one of four actions consolidated in the U.S. District Court for the Northern District of Alabama. The four actions challenged employment and promotion practices of various local governments and agencies in the Birmingham, Alabama area. The Personnel Board of Jefferson County, Alabama (the "Board"), which screens and ranks applicants for employment and certifies eligible candidates to the local governments and agencies, is a defendant in all four actions.

The district court found that the Board's use of standardized employment tests to screen and rank applicants for police officers' and firefighters' positions violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e because the tests, which had a massive adverse impact on black applicants for employment, were not demonstrably

job-related (A 31-55).[2] Having found that the Board's use of these tests violated Title VII, the district court undertook to "determine when the requirements of law were violated and what relief is appropriate therefore" (A-55). It noted that Title VII had applied to the Board since March, 1972.[3] At that point, the Board had conducted "a preliminary in-house validity study" which contained some "indication of appropriate validity based upon relationship with existing criterion measures" (A-55). The court noted that the Board had then hired independent consultants to perform "an in-depth independent validity study" and the "preliminary reports from the consultants, made while more trustworthy measures of job performance were being developed, contained signs of potential validity and recommended use of the tests pending the additional studies" (A-55-56). The court held that the Board's violation of Title VII did not begin until the results of the independent validity studies (which the court had found insufficient to allow use of the tests under Title VII) were reported to the Board:

> "Not until April 25, 1975, with respect to the 10-C, and July 8, 1976, with respect to the 20-B, were the studies using these new criterion measures completed and reported to the Board. It was on these respective dates that, in the court's opinion, it should have been concluded that provisional use of the tests was no longer permissible. Prior thereto,

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[2] Citation is to the Appendix that accompanies the Board's petition for certiorari in No. 80-406. The facts pertinent to the district court's ruling that the Board violated Title VII are set forth in the Brief of Respondents John W. Martin *et al.* in Opposition to Petition for Writ of Certiorari, which we have today separately filed with this Court.

[3] The Equal Employment Opportunity Act of 1972, § 2, 86 Stat. 103, amended § 701(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(a), to include government agencies such as the Board within the Act's definition of "employer."

> the Board was, in the court's opinion, justified in continuing to use the tests (and the eligibility lists generated therefrom) in anticipation of favorable results from those studies. Use of the tests (or of the eligibility lists therefrom) was thereafter, however, contrary to the requirements of Title VII, which overrides state law inconsistent therewith." (A-56).

The district court set hiring goals and timetables based on its view that the Board did not violate Title VII until April 25, 1975, in the case of the 10-C examination, and July 8, 1976, in the case of the 20-B examination. Essentially, the district court ordered the Board to revise eligibility lists so that black applicants would be represented on the lists in proportions equal to the percentages of black and white candidates tested since those dates (A-56-57). This resulted in significantly fewer black applicants being placed on the eligibility lists than would have been the case if the district court had extended relief to all black applicants injured by use of the tests since Title VII became applicable to the Board in March, 1972.

Plaintiffs cross-appealed from the district court's order and argued on appeal that the order failed to provide full injunctive relief from the effects of employment discrimination. The Board argued on appeal only that the limitation on relief was a justified exercise of equitable discretion by the district court.[4] Without the benefit of briefs or argument, the court of appeals held that § 713 (b) of Title VII, 42 U.S.C. § 2000e-12, would provide the Board with a defense against injunctive or backpay liability for the period when it was attempting to validate

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[4] The Board's brief on appeal did not suggest that § 713(b) of Title VII, 42 U.S.C. § 2000e-12, afforded it a defense against liability for the period while it was attempting to validate the tests. Brief of Defendant-Appellant and Cross Appellee at 57-61.

the examinations, if the Board could prove that the conditions of § 1607.9 of the EEOC Guidelines on Employee Selection Procedures. 29 C.F.R. § 1607.9 (1977) had been met during this period (A-25-26).

The court of appeals noted that § 713(b) provides an employer with a defense against Title VII liability "if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [EEOC]." (A-25-26). It also noted that § 1607.9 of the EEOC Guidelines on Employee Selection Procedures provides that an employer "may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity" if he shows that other studies have validated the test and if he has in progress his own validation studies designed to validate the test within a reasonable time. The court of appeals reasoned that:

> "The natural reading of EEOC Guideline § 1607.9 (as it was in effect at all times relevant to this proceeding), especially when read in light of Title VII, § 713(b), is that an employer will be immune from liability during the period of permissible provisional use of an unvalidated test. Section 713(b) of Title VII provides a defense to an employer who complies with, and relies in good faith upon, EEOC Guidelines, such as § 1607.9." (A-26; footnotes omitted.)

Since the district court had not determined whether the Board had met the requirements of § 1607.9 and of § 713(b), the court of appeals remanded the action for such a determination.

In a timely petition for rehearing, John W. Martin *et al.* pointed out that the EEOC had, by regulation,[5]

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[5] This regulation was originally promulgated at 30 Fed. Reg. 8409 (1965) in a text that does not differ materially from its current text.

defined what constituted a "written interpretation or opinion of the [EEOC]" providing an employer with a defense under § 713(b) and that § 1607.9 of the Guidelines did not qualify as such under the regulation. The court of appeals denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, IN REFUSING TO FOLLOW THE EEOC'S REGULATION, CONFLICTS WITH DECISIONS OF THE FOURTH AND SEVENTH CIRCUITS AND WITH A PRIOR DECISION OF THE FIFTH CIRCUIT.

As the court of appeals noted, § 713(b) provides an employer with a defense against Title VII liability only if he proves that he acted, *inter alia*, in reliance on a "written interpretation or opinion of the Commission." The EEOC has defined by regulation what falls within this category:

> "*Only* the following may be relied upon as a 'written interpretation or opinion of the Commission' within the meaning of Section 713 of Title VII:
>
> (a) A letter entitled 'opinion letter' and signed by the General Counsel on behalf of the Commission, or
>
> (b) Matter published and specifically designated as such in the FEDERAL REGISTER, including the Commission's Guidelines on Affirmative Action, or
>
> (c) A Commission determination of no reasonable cause, issued under the circumstances described in § 1608.10(a) or (b) of the Commission's Guidelines on Affirmative Action 29 CFR Part 1608, when such determination contains a statement that it is a 'written interpretation or opinion of the Commission.'" 29 C.F.R. § 1601.33 (1979) (Emphasis added).

Section 1607.9 of the EEOC Guidelines, on which the court of appeals relied, is obviously not an "opinion letter" signed by the EEOC general counsel or an EEOC "determination of no reasonable cause," and it was never designated in the Federal Register as a "written interpretation or opinion of the Commission." Thus, the effect of the decision of the court of appeals is to nullify the EEOC regulation defining "written interpretation or opinion" of the Commission.

The court's refusal to follow the EEOC regulation defining "written interpretation or opinion" stands in conflict with decisions of other circuits that have upheld and applied this regulation so as to avoid confusion over what materials might provide employers with a defense based on Section 713(b). Thus, the Fourth Circuit in *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) upheld and applied this regulation as "an eminently reasonable one . . . [which] insures that the only Commission interpretations and opinions that will be given binding effect are those based either upon a solid factual foundation or upon the most thorough consideration of the potential factual situations to which the rule might apply." So too, the Seventh Circuit in *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1200 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) upheld and applied the regulation as one that "reasonably confines reliance justified under Section 713(b) to consider official expressions of opinion taking two specifically defined forms." Indeed, until the decision below, the Fifth Circuit itself upheld and applied the regulation since, as stated in *Local 189, United Papermakers* v. *United States*, 416 F.2d 980, 997 (5th Cir. 1969), "[a] broader reading might bind the Commission to informal or unapproved opinions volunteered by members of its staff."

The practical importance of the Fifth Circuit's sudden departure from the settled acceptance of this EEOC regulation should not be underestimated. It gives § 713 (b) a broad and uncertain scope, and it invites defendants to rely on a wide variety of materials purportedly constituting a "written interpretation or opinion of the Commission." [6] The Commission's regulation defining this phrase was intended to remove just such uncertainty and to give litigants a clear understanding of their rights and liabilities under Title VII.

Moreover, the Fifth Circuit has departed from the settled construction of § 713(b) in a case where EEOC did not intend to provide employers with a defense to a Title VII action by private plaintiffs. Nothing in the text of § 1607.9 of the EEOC Guidelines suggests that it was intended to be anything more than an exercise of prosecutorial discretion under which EEOC would refrain from instituting suit pending the outcome of ongoing validation studies. The text of this guideline does not suggest that, if the validation studies do not establish job relatedness, then the employer is nevertheless relieved of all liability to those injured by his use of racially discriminatory tests during the validation effort. Indeed, the more recent guidelines concerning employee selection procedures under Title VII make explicit what is implicit in § 1607.9 itself: When tests are not ultimately validated, the employer must bear the liability for use of the tests during the period when validation studies were in progress.[7]

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[6] As this Court noted in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 423 n.17 (1975), § 713(b) embodies a "legislative choice to recognize only a narrowly defined 'good faith' defense" to Title VII liability. The decision below, in nullifying the EEOC regulation defining the scope of the § 713(b) defense, runs contrary to this legislative choice.

[7] The Justice Department's Guidelines on Employee Selection Procedures provide in § 5h that "[i]f the additional studies do not

II. THE DECISION BELOW, INSOFAR AS IT CONSTRUES § 713(b) TO BAR A CLAIM FOR INJUNCTIVE RELIEF, CONFLICTS WITH THE NINTH CIRCUIT.

The decision of the court of appeals in this case holds that even injunctive relief, the only relief granted thus far in this action, is not available in circumstances where § 713(b) provides the employer with a defense against "liability or punishment." In so holding, the court of appeals stands in conflict with the Ninth Circuit. In *Rosenfeld* v. *Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971) that court held that § 713(b) was relevant only to a claim for damages. This holding was reaffirmed in a subsequent appeal in the same action, where the court stated that "under section 713(b), good faith reliance is relevant only to liability for back pay or other damages, and does not bar declaratory or injunctive relief." *Rosenfeld* v. *Southern Pacific Company*, 519 F.2d 527, 529 (9th Cir. 1975).

III. THE DECISION BELOW DENIES VICTIMS OF EMPLOYMENT DISCRIMINATION THE FULL RELIEF MANDATED BY THIS COURT'S DECISIONS IN *GRIGGS* AND *ALBEMARLE PAPER*.

Under the court of appeals' erroneous construction of § 713(b) and the EEOC Guidelines, persons who suffer the effects of racially discriminatory tests, or other em-

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produce the data required to demonstrate validity, the user is not relieved of or protected against any obligations arising under federal law." 28 C.F.R. § 50.14 (1976); A-145. These guidelines, as well as those of the EEOC, were replaced by the Uniform Guidelines on Employee Selection Procedures, which provide that "[i]f the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligation arising under Federal law." 29 C.F.R. § 1607.5J (1979); A-93.

ployee selection devices violative of Title VII, during a period when an employer is attempting to validate the tests or devices will be denied all relief for the discrimination they suffered. Such a result undercuts the basic purpose of Title VII which, as this Court noted in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971), is not merely to prohibit intentional employment discrimination but also to prohibit "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

This Court made clear in *Albemarle Paper Co.* v. *Moody, supra*, that the remedies granted to Title VII plaintiffs "must . . . be measured against the purposes which inform Title VII," which include "mak[ing] persons whole for injuries suffered on account of unlawful employment discrimination." 422 U.S. at 417, 418. This Court therefore held in *Albemarle* that the backpay remedy "should be denied only for reasons which, if applied generally, would not frustrate the statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421.

The court of appeals' creation of an exemption from liability based on the "provisional use" provision of § 1607.9 of the EEOC Guidelines plainly frustrates the mandate of *Griggs* and *Albemarle*. It denies injunctive relief, as well as damages, to persons injured by the "provisional use" of tests later shown to violate Title VII. Such an exemption creates an anomalous gap in Title VII remedies since, from the standpoint of the victim of testing, it matters not whether he or she was tested (a) while the employer was carrying on studies that it hoped would validate the examination, or (b) after the employer's studies had failed to validate the examination. In either case, the victim is denied employment opportunities on the

basis of a test that the employer has not shown to be job-related; and, in either case, this Court's decisions in *Griggs* and *Albemarle* require that the victim be made whole.

CONCLUSION

If the petition for certiorari in No. 80-406 is granted, this cross-petition also should be granted.

Respectfully submitted,

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